



Via Electronic Submission

October 12, 2018

Christopher Kirkpatrick, Secretary Commodity
Futures Trading Commission Three Lafayette
Centre
1155 21st Street, N.W.
Washington, D.C. 20581

**Re: Notice of Proposed Rulemaking on the Exemption from Derivatives Clearing
Organization Registration (RIN No. 3038-AE65)**

Dear Mr. Kirkpatrick:

The Futures Industry Association (“**FIA**”)¹ and Securities and Financial Markets Association (“**SIFMA**”; collectively, the “**Associations**”)² appreciate the opportunity to comment on the Commodity Futures Trading Commission’s (“**CFTC**” or “**Commission**”) Notice of Proposed Rulemaking on the Exemption from Derivatives Clearing Organization Registration (the “**Proposal**”).³ We understand that the Proposal is part of the Commission’s “Keep It Simple Stupid” initiative (“**Project KISS**”) and seeks to codify the existing policies and procedures the Commission is currently following with respect to granting exemptions for non-US clearinghouses (“**CCPs**”) from Derivatives Clearing Organization (“**DCO**”) registration.

¹ FIA is the leading trade organization for the global futures, options and over-the-counter cleared derivatives markets. Its mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system and to promote high standards of professional conduct. FIA’s core constituency consists of futures commission merchants (“**FCMs**”), which provide clearing and execution services for clients active in financial markets around the world. FIA’s FCM members play a critical role in managing systemic risk in the global financial markets. They provide the majority of the funds that support clearinghouses and commit a substantial amount of their own capital to safeguard customer transactions. FIA’s membership also includes the major global exchanges, clearinghouses, trading platforms, technology vendors, legal services, and consulting firms representing the futures and derivatives industry.

² SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

³ Exemption From Derivatives Clearing Organization Registration, 83 Fed. Reg. 39,923 (Aug. 13, 2018).

While we support the Commission's efforts to clarify and streamline its rules and practices, and in particular support efforts to facilitate U.S. market participants' access to global derivatives markets and clearinghouses, we respectfully submit that the Proposal should be withdrawn and re-proposed at such time as the Commission is able to propose a rulemaking, or set of rulemakings, that reflects Chairman Giancarlo's vision for cross-border swaps regulation, including his recommendations for reform of the CFTC's regulatory framework for cross-border clearing services, as set forth in his recently published White Paper.⁴ We strongly believe that delaying action on the Proposal is necessary for the Commission to act in a fully informed and deliberate manner on the important issues raised in both the Proposal and the White Paper.

I. The Associations Support the Objectives of the Proposal.

We value the goal of the Commission's Project KISS initiative to adopt regulations that codify the Commission's current policies and procedures. Such codifications make the policies and procedures more transparent and help to ensure a level playing field for all market participants. We therefore appreciate that the Proposal seeks "to codify the policies and procedures that the Commission is currently following with respect to granting exemptions from DCO registration in order to make such policies and procedures transparent to all potential applicants."⁵

We further support the Proposal to the extent that it seeks to facilitate US firms' access to global markets and clearinghouses. As a truly global market, cross-border access to derivatives is critically important for market participants, including end-users, to find the product that allows them to most efficiently transact and manage their risk, which in turn mitigates risk and supports economic growth. Rules should facilitate access to those markets while keeping the integrity of markets and participants in mind. In order to facilitate access to markets on a cross-border basis, regulators should defer to each other when the rules in the home country of the firm or infrastructure are comparable and comprehensive. This recognition of home country oversight fosters mutual trust among jurisdictions and tends to drive jurisdictions closer to harmonized rules.

II. The Proposal is Premature and Should Be Withdrawn and Re-Proposed to Accommodate the Chairman's White Paper on Cross-Border Swaps Regulation.

The Commodity Exchange Act ("CEA") provides that a clearing organization may not "perform the functions of a [DCO]" unless it is registered with the Commission as a DCO. However, the CEA permits the Commission to conditionally or unconditionally exempt a clearing organization from registration for the clearing of swaps if it determines that the clearing organization is subject to "comparable, comprehensive supervision and regulation" by appropriate government authorities in the clearing organization's home country.⁶ The Proposal provides that the Commission may exempt a non-U.S. clearing organization from registration as a DCO for the clearing of swaps for certain U.S. persons, and thereby exempt such clearing organization from compliance with the provisions of the CEA and Commission regulations applicable to DCOs, if the Commission determines that certain

⁴ J. Christopher Giancarlo, Chairman, Commodity Futures Trading Commission, Cross-Border Swaps Regulation 2.0: A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation (Oct. 1, 2018), https://www.cftc.gov/sites/default/files/2018-10/Whitepaper_CBSR100118.pdf.

⁵ 83 Fed. Reg. at 39,923.

⁶ Section 5b(h) of the CEA, 7 U.S.C. 7a-1(h).

requirements are met.⁷ Among the requirements are that: (1) the clearing organization must be organized in a jurisdiction in which it is subject to home country rules that are consistent with the Principles for Financial Markets Infrastructures and (2) a U.S. person that is a clearing member of an exempt DCO may only clear swaps for itself and its affiliates, and may not clear swaps for U.S. customers.⁸

After issuance of the Proposal, on October 1, 2018, Chairman Giancarlo published a White Paper titled “Cross-Border Swaps Regulation Version 2.0” (the “**White Paper**”). Totalling more than 100 pages, the White Paper calls for a comprehensive and substantial rework of the Commission’s framework for cross-border regulation of swaps markets. Importantly, the White Paper makes specific recommendations for registration of non-U.S. CCPs. These recommendations relate to, and, in some instances, appear to conflict with, provisions in the Proposal. The White Paper contemplates the CFTC issuing a series of new rule proposals to address these and other cross-border issues in swaps reform.⁹

Noting that the CFTC has used its authority under the CEA to exempt certain non-U.S. CCPs from registration for the clearing of proprietary swap positions of U.S. clearing members, the White Paper recommends that the Commission expand the use of its exemptive authority for non-U.S. CCPs that are subject to comparable regulation in their home country and that do not pose substantial risk to the U.S. financial system. The White Paper then recommends that the Commission adopt rules that would follow the CFTC’s “long-standing, cross-border approach with respect to futures clearing.” Under the recommended approach, such non-U.S. CCPs would be permitted to provide clearing services not only to U.S. clearing members clearing their proprietary swap positions, but also indirectly to U.S. customers clearing swaps positions through non-U.S. clearing members, without the non-U.S. CCP or its non-U.S. clearing members having to register as a DCO or FCM.¹⁰ If this approach is adopted, as recommended by the Chairman, it would expand the availability of the exemption for non-U.S. CCPs that the CFTC currently recognizes and that the Proposal seeks to codify to include clearing for U.S. customers.

Both the White Paper and the Proposal attempt to clarify the circumstances in which it would be appropriate to exempt a non-U.S. CCP from DCO registration. In recommending an expanded framework for the use of the Commission’s exemptive authority for non-U.S. CCPs that accommodates both proprietary and customer clearing, however, the White Paper conflicts with the provision in the Proposal that would limit DCO registration exemptions for non-U.S. CCPs to clearing services for proprietary swap positions. In lieu of adopting provisions in the Proposal that may impact or even conflict with the contemplated rulemaking, or suite of rulemakings, that the Chairman intends to propose to effect the cross-border regulatory reforms set forth in the White Paper, we submit that it would be a more effective use of CFTC resources and provide more certainty

⁷ 83 Fed. Reg. at 39,925.

⁸ 83 Fed. Reg. at 39,925-26.

⁹ White Paper at 13.

¹⁰ White Paper at 44-45. We note that, while the White Paper cites CFTC Regulation 30.10 as providing a model for this approach, CFTC Regulation 30.7 also provides a trusted mechanism for clearing foreign futures through an omnibus account structure. As discussed in more detail below, we believe CFTC Regulation 30.7 provides an equally viable and important route for extending the use of the Commission’s exemptive authority for non-U.S. CCPs in respect of cross-border swaps clearing. Any rules implementing the White Paper’s recommendations should adopt cross-border clearing models for swaps that are analogous to both CFTC Regulations 30.10 and 30.7.

to market participants if the Commission withdraws the Proposal and re-proposes it when the CFTC addresses such cross border rulemaking(s). This would enable CFTC staff to ensure that any proposal to codify the Commission's use of its exemptive authority from DCO registration for non-U.S. CCPs is consistent with the Chairman's specific recommendations in the White Paper for cross-border swaps clearing and his overall vision for cross-border swaps regulatory reform.

III. The Associations Support Expansion of DCO Registration Exemptions to Permit Customer Clearing at Non-U.S. CCPs

As noted above, the White Paper recommends an expanded approach to its exemptive authority for non-U.S. CCPs, "similar to the CFTC's long standing, cross-border approach with respect to futures clearing."¹¹ We support this recommendation and urge the Commission to adopt rules consistent with that approach and as we further outline below.

Indeed, the Associations jointly published a paper ("**FIA/SIFMA Paper**") on December 14, 2017, citing the CFTC's approach for futures clearing on non-US CCPs as a model for swaps clearing (see **Appendix A**).¹² That paper notes that, while the CFTC's current approach (which the Proposal would codify in part) has generally addressed existing swaps clearing models, market participants increasingly need additional flexibility. Market participants are facing new mandatory clearing requirements in some foreign jurisdictions that require U.S. dealers to expand use of local CCPs. Moreover, continued implementation of initial margin requirements for non-centrally cleared swaps provides added incentives for U.S. customers to centrally clear a wider range of swaps in a larger number of jurisdictions. With the increased need for local swaps clearing, we agree with the White Paper that an updated swaps clearing framework that is modeled on the flexibility of the futures clearing access model is appropriate.

The CFTC has permitted two structures for U.S. customers to clear futures and options contracts listed on a foreign board of trade: (1) a clearing structure in which a U.S. customer clears through a U.S. FCM that maintains the U.S. customer's positions and margin in a customer omnibus account held by a non-U.S. clearing member that is not registered as an FCM; and (2) a direct clearing structure in which a U.S. customer clears through a non-U.S. clearing member that is exempt from FCM registration on the basis of comparable home country regulation. CFTC Regulation 30.7 authorizes the former clearing structure with respect to foreign futures and options, and CFTC Regulation 30.10 authorizes the latter.

There would be numerous benefits to extending both of these Part 30 clearing structures to cross-border swaps clearing. Part 30's clearing structure affords U.S. customers a greater range of FCMs through which they can clear abroad because it does not require U.S. customers to clear through an FCM that is a direct member of every non-U.S. CCP through which the customer wants to transact. Additionally, from the perspective of U.S. FCMs, the clearing structure allows them to offer clearing at a wider range of non-U.S. CCPs—thus expanding the range of business they can conduct—at significantly less cost and risk than direct participation in non-U.S. CCPs. For example, the clearing structure does not require a registered U.S. FCM to contribute to the guarantee fund of non-U.S. CCPs or become subject to any assessment rights or other extraordinary loss allocation measures

¹¹ White Paper at 44.

¹² Futures Industry Association and Securities Industry and Financial Markets Association, Promoting U.S. Access to Non-U.S. Swaps Markets: A Roadmap to Reverse Fragmentation (Dec. 14, 2017), <https://fia.org/articles/fia-and-sifma-release-white-paper-us-access-non-us-trading-venues-and-ccps> (attached hereto as **Appendix A**).

pursuant to a non-U.S. CCP's rules and procedures. Furthermore, the clearing structure allows U.S. FCMs to more effectively manage risk exposure to CCPs by, for example, consolidating exposure through a single affiliate that need not be an FCM.

As the CFTC progresses to the rulemakings that implement the recommendations of the White Paper regarding swaps clearing, we urge the CFTC to consider the full range of futures access models. As the White Paper notes, "the professional nature of the swaps market," with its "sophisticated, institutional market participants" should be offered the commercial choice of access routes.¹³ We believe providing the options of access through both the 30.7 omnibus access model and the direct 30.10 model is important to simplifying client documentation relationships with brokers where appropriate, while also allowing customers to explore cost options for direct access with local clearing members of non-U.S. CCPs for swaps clearing. The FIA/SIFMA Paper supports this futures framework as a model for swaps clearing rules on non-U.S. CCPs and provides recommendations for rules that could support such a model. We respectfully request that the CFTC withdraw the current proposal, consider the recommendations in the FIA/SIFMA Paper, and re-propose rules consistent with the White Paper's principles that non-U.S. CCPs be exempt from DCO registration where subject to comparable and comprehensive regulation in its home country.

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We appreciate your consideration of the Association's comments on this important issue. Please contact us at 202-466- 5460 or alurton@fia.org or 212-313-1280 or kbrandon@sifma.org if you have any questions about this letter.

Respectfully submitted,



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cc: Honorable J. Christopher Giancarlo, Chairman
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¹³ White Paper at 44.